In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1041

SAMUEL A. KAUFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1969. The petition for a writ of certiorari was filed on February 13, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether under the rationale of *Katz* v. *United States,* 389 U.S. 347, the court should have excluded

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evidence of federal agents as to the contents of conversations with petitioner overheard by them (a) by means of an electronic transmitting device placed on the person of an agent whom petitioner was trying to bribe and (b) on an extension telephone with the consent of the agent who spoke to petitioner.

STATEMENT

1. After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of bribing an agent of the Internal Revenue Service with intent to influence official action, in violation of 18 U.S.C. 201(b). He was sentenced to imprisonment for one year and a $4000 fine.

The facts are not in dispute. In early 1966 petitioner, a certified public accountant, had a series of meetings with Internal Revenue Agent Arney to discuss an audit of two of his clients' federal income tax returns. At a meeting on July 21, 1966, after being informed that an additional tax of $7000 to $8000 was due, petitioner offered Arney $400 to reduce the tax deficiency to around $500. Arney immediately reported the bribe offer to his superiors. The next day, with I.R.S. Agent Goldenberg listening in on an extension telephone with Arney's consent, Arney called petitioner and told him that he had decided to go along with the offer. They agreed to meet on July 25 at a subway station to complete the transaction. On July 25, Arney went to the appointed place equipped with a Fargo radio transmitter secreted on his person and a Minifon recording device in an attache case. He told petitioner that he had

reduced the tax deficiency from $7000 to $497. Petitioner counted out $400 and passed it to Arney.[1]

2. The court of appeals affirmed the conviction on December 18, 1967 (see 387 F. 2d 17), the day this Court decided *Katz* v. *United States,* 389 U.S. 347. Thereafter petitioner brought the present *coram nobis* action contending that under *Katz* evidence of the overhearing on the extension telephone and the tape recording had been improperly received. The trial judge denied relief (Pet. App. B), and the court of appeals affirmed (Pet. App. A).

DISCUSSION

The issue of whether a search warrant is required for the overhearing or recording of a conversation by electronic means, where one of the parties has consented, is before this Court on our petition for a writ of certiorari to the Seventh Circuit in *United States* v. *White,* No. 1024, this Term. In the *White* case, the Seventh Circuit *en banc,* with three judges dissenting, held that a warrant was required even where the overhearing was with the consent of one party to the conversation. The court of appeals below specifically stated that it was not persuaded by the majority opinion in *White* and would follow this Court's decision in *Lopez* v. *United States,* 373 U.S. 427, which sustained the admissibility of a tape recording obtained by electronic means in circumstances indistinguishable from the instant case (Pet. App. A. 4).

[1] Both Agent Arney and Agent Goldenberg testified at the trial. In addition a recording of the July 25 conversation was introduced in evidence.

For the reasons set forth in our petition for certiorari in *White,* we believe the holding of the court of appeals in this case to be correct. In view, however, of the conflict between the circuits on this significant question, we do not oppose the granting of certiorari to consider whether petitioner's Fourth Amendment rights were violated by the overhearing and recording of his conversations.[2] We note, however, that the question whether *Katz* should be applied retrospectively is pending in *Desist et al* v. *United States,* (No. 12, this Term). Since the federal agents' conduct in this case occurred prior to the holding in *Katz,* there would seem to be no reason to grant the present petition if it is decided that *Katz* should not be given retroactive application.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

March 1969.

[2] As pointed out in the petition in *White*, the Fifth Circuit in several opinions has held, contrary to *White*, that the *Katz* requirement of a warrant was not meant to apply to consent situations. A decision of the Tenth Circuit in *Holt* v. *United States* (404 F. 2d 914) is in accord with that view. A contrary decision by a different panel of the Tenth Circuit in *Doty* v. *United States* (Pet. App. E), is presently pending on a petition for rehearing granted by the panel.

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